Supreme Court, U. S.
FILED
AUG 20 1975
MICHAEL [illegible], CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1243

ALVIN A. BECKWITH, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

JOHN G. GILL, JR.
17 West Jefferson Street
Rockville, Maryland 20850
Attorney for Petitioner.

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT 3

SUMMARY OF ARGUMENT 7

ARGUMENT

As the Target of Legal Harassment by Way of an Exclusively Criminal Tax Probe Petitioner Was Entitled to Full Miranda Warnings 8

A. At the Time of the Critical August 2, 1972 Interview, the Investigation Had Reached the Accusatory Stage 8

1. Extreme focus 8

2. Critical stage 16

B. Interrogations by Tax Agents Involve Coercive Elements Equivalent to Station House Interrogation 18

1. The United States employs a self-taxing system 18

2. Most citizens justifiably feel they are discussing an exclusively civil matter 20

3. The very complexities of the tax laws create a heightened need for awareness of constitutional rights to silence and to counsel 22

4. Agents are trained to discourage the free exercise of constitutional rights 26

5. During an interview a taxpayer experiences justifiable social and economic fears which compel cooperation 27

Page

6. The combined effect of all of the above 29

C. The Investigative Procedure Here Used Is Violative of Due Process 32

D. The Warnings Accorded Petitioner Were Insufficient Under Miranda 37

1. Right to remain silent 40

2. Right to Have an attorney present during interrogation 37

3. Right to an appointed attorney 38

4. Right not to produce documents 39

E. There Exists a Minimal Burden of Corrective Action 40

CONCLUSION 41

TABLE OF CASES

Cases:

Ancira v. State, 516 S.W.2d 924 (Tex.) 14

Brown v. Beto, 468 F.2d 1284 (5th Cir.) 14

Bumper v. North Carolina, 391 U.S. 543 25

Donaldson v. United States, 400 U.S. 517 20

Escobedo v. Illinois, 378 U.S. 478 ..... *passim*

Frank v. Maryland, 359 U.S. 360 34

Gideon v. Wainright, 372 U.S. 335 15

Gilbert v. California, 388 U.S. 263 17

Green v. United States, 411 F.2d 588 (10th Cir.) 39

Haley v. Ohio, 332 U.S. 596 25

Hamilton v. Alabama, 368 U.S. 52 ..... 15, 17

Holland v. United States, 384 U.S. 121 ..... 24, 33

Jenkins v. McKeithen, 395 U.S. 411 34

Page

Cases, continued:

Killough v. United States, 114 U.S.App. D.C. 305, 315 F.2d 241 41

Mallory v. United States, 354 U.S. 449 41

Massiah v. United States, 377 U.S. 201 ..... 15, 17

Mathis v. United States, 391 U.S. 1 ..... 10, 16, 31

Michigan v. Tucker, 94 S. Ct. 2357 ..... 11, 39

Miranda v. Arizona, 384 U.S. 436 ..... *passim*

Montoya v. United States, 392 F.2d 731 (5th Cir.) 39

Morrissey v. Brewer, 408 U.S. 471 33

Orozco v. Texas, 394 U.S. 324 10

Paine v. Arkansas, 356 U.S. 560 25

People v. Collin, 232 Cal. App.2d 681, 43 Cal. Rept. 57 18

People v. Layton, 29 Cal. App.3d 349, 105 Cal. Rept. 509 18

Pointer v. Texas, 380 U.S. 400 17

Powell v. Alabama, 287 U.S. 45 17

Randall v. Estelle, 492 F.2d 118 (5th Cir.) 14

Schmerber v. California, 384 U.S. 757 40

Silverthorne Lumber Company v. United States, 251 U.S. 285 12

Smith v. United States, 348 U.S. 147 25

Spano v. New York, 360 U.S. 315 ..... 15, 17

State v. Godfrey, 131 N.J. Super. 168, 329 A.2d 75 18

Stern v. Robinson, 262 F.Supp. 13, (W.D. Tenn.), appeal dismissed, 391 F.2d 601 (6th Cir.) 40

Stovall v. Denno, 388 U.S. 293 17

Thomas v. United States, 386 U.S. 975 29

United States v. Calderon, 348 U.S. 160 25

United States v. Dickerson, 413 F.2d 1111 (7th Cir.) 30

Cases, continued: Page

United States v. Dickerson, 291 F.Supp. 633 (N.D. Ill.) 12, 19, 21

United States v. Fox, 403 F.2d 97 (2nd. Cir.) 38, 39

United States v. Garcia, 496 F.2d 670 (5th Cir.) 14

United States v. Maius, 378 F.2d 716 (6th Cir.) cert. den., 389 U.S. 905 22

United States v. Mandujano, 496 F.2d 1050 (5th Cir.) 34, 36

United States v. Miller, 261 F.Supp. 442 (D. Del.) 39

United States v. Mullings, 364 F.2d 173 (2d. Cir.) 38

United States v. Oliver, 505 F.2d 301 (7th Cir.) 13, 21, 30

United States v. Phelps, 443 F.2d 246 (5th Cir.) 14

United States v. Prior, 381 F.Supp. 870 (M.D. Fla.) 34

United States v. Rangel, 496 F.2d 1059 (5th Cir.) 34

United States v. Sherman, U.S. Dist. Ct. D.C. Docket No. 74-187 10

United States v. Skelly Oil Company, 394 U.S. 678 23

United States v. Turzyanski, 268 F.Supp. 847 (N.D.Ill.) 12, 16

United States v. Wade, 388 U.S. 218 17

United States v. Wong, No. 74-1636 (Sep. 23, 1974, 9th Cir.) 34, 35

White v. Maryland, 373 U.S. 59 ..... 15, 17

Windsor v. United States, 389 F.2d 530 (5th Cir.) 39

Constitutional Provisions

Constitution of the United States:

Amendment V 2

Amendment VI 2

Statutes

Internal Revenue Code of 1954, As Amended

26 U.S.C. §6001-6010 19

26 U.S.C. §6212-6213 28

26 U.S.C. §7201 3

26 U.S.C. §7203 19

Miscellaneous: Page

Andrews, "The Right to Counsel in Criminal Tax Investigations under Escobedo and Miranda: The 'Critical Stage,' " 53 Iowa L.Rev. 1074 ..... 14, 18, 29, 30

1965 Annual Report of Commissioner Internal Revenue 20

1969 Annual Report of Commissioner Internal Revenue 20

Benjamin Franklin Letter to M. Leroy, 1789 18

Committee on Tax Policy 1970-1971 New York State Bar Association, Tax Section, "A Report on Complexity and the Income Tax," 27 Tax Law Review 325 23

Duke, "Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid," Yale L.J. 1 (1966) ..... *passim*

Forrester, "Constitutional Rights of the Taxpayer in a Tax Fraud Investigation," 42 Tulane L.Rev. 862 (1968) 30

Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary 1179 28

Internal Revenue Service Audit Technique Handbook §10.90(2) 26

Internal Revenue Service Press Release, Oct. 3, 1967, CCH 67-2, Par. 9489 n.9 37

Internal Revenue Service Training No. 3158-01(5-73) CCH Federal Tax Reports No. 29 June 6, 1973 ..... 26, 27, 32

§2.034 26

§3.04 27

§4.013 27

Lay, "Right to Counsel in Criminal Tax Investigations," 43 Indiana L.J. 69 (1969) 30

Lipton, "Constitutional Rights in Criminal Tax Investigations," 45 FRD 293 (1968) 20, 30

Miscellaneous, continued: Page

Simmons, "The Shift of Emphasis Theory: Constitutional Rights of Taxpayers in Criminal Fraud Investigations in Light of Miranda v. Arizona," 20 Syracuse L.Rev. 725 (1969) 30

Skees, 46 Ind. L.J. 361 (1971) 30

Surrey, "Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail," 34 Law and Contemporary Problems 673 (1969) 14

Weinstein, "Constitutional Rights of a Taxpayer in Criminal Tax Investigations," 16 J. Public Law 403 (1967) 30

Weiss, 25 Journal of Taxation 26 (1966) 8, 15, 30

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1243

ALVIN A. BECKWITH, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. It is reproduced in the Appendix to the Petition for Certiorari in this case (Pet. App. 1a). The District Court wrote no opinion but gave an oral ruling which is found at Pet. App 1b-2b.

JURISDICTION

The opinion of the Court of Appeals was filed on January 22, 1975. Petitioner filed a timely petition for re-hearing and suggestion for re-hearing *en banc*, which was denied by order of the Court of Appeals filed March 3, 1975. The petition for *certiorari* herein was filed April 2, 1975. This Court granted that petition June 16, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Fifth and the Sixth Amendments to the Constitution of the United States entitled petitioner to complete *Miranda* warnings by Special Agents of the Intelligence Division of the Internal Revenue Service during the "critical" August 2, 1972, interview, which interview took place during the accusatory stage of a solely criminal tax investigation at a time when appellant was a "target defendant" and the subject of "legal harassment" by the Government which believed petitioner to be an illegal narcotics trafficker but had absolutely no proof of such criminal activity?

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States of America, Amendment V:

> No person shall be * * * compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law; * * *

Amendment VI:

> In all criminal prosecutions, the accused shall * * * have the assistance of counsel for his defense.

STATEMENT

Petitioner was charged with two (2) counts of attempting to Evade and Defeat Federal Income Taxes in violation of 26 U.S.C. §7201 by indictment filed June 6, 1973, in the District Court for the District of Columbia. On October 4, 1973, the Honorable Aubrey Robinson heard and denied petitioner's Motion to Suppress Statements and Evidence. Thereafter on March 21, 1974, petitioner waived his right to jury trial and was found guilty on a stipulated record as to Count 2 of the indictment. On May 2, 1974, petitioner was sentenced to a maximum term of five (5) years imprisonment plus a $10,000 fine plus court costs. Count 1, which had been severed on the date of trial was then dismissed. Upon his appeal to the District of Columbia Circuit, his conviction was affirmed and his petition for rehearing and suggestion for re-hearing *en banc* to that Court were denied.

The theory of prosecution upon which petitioner stands convicted was the "net worth" method of proving a criminal understatement on his 1971 Federal Tax Return. Prior to trial, petitioner, his trial counsel, and the Government entered into a detailed stipulation covering some 60 items and nine pages of exhibits (R. 13). This stipulation saved the prosecution from calling over 100 witnesses.

Crucial to the prosecution's case was stipulation number 2 (App. 70-71) which covered some 10 different statements made by petitioner during his initial interrogation by two Special Agents of the Intelligence Division of the Internal Revenue Service on August 2, 1972. These statements of defendant covered his sources of income prior to 1972, his cash on hand each year from 1965 through 1971 and certain other important facts concerning the preparation of the computations on his 1971

Federal Income Tax Returns. There is substantial agreement between the parties that, without the starting point provided by Stipulation No. 2, the prosecution would not have had a provable case against petitioner.

It was from the starting point provided by petitioner's August 2, 1972 statements that a taxable income of $24,638.02 was computed for petitioner in 1971. This in turn showed a criminal understatement of $13,815.24 and an income tax deficiency of $5,895.54 (Stipulation No. 24, R. 13, pp. 6-7, App. 71-72). Petitioner presented no factual defense to the stipulated record (Stipulation No. 26, App. 72) and was thus found guilty.

Prior to trial, petitioner moved to suppress all statements he made to Special Agents of the Internal Revenue Service on August 2, 1972. At the hearing the Court noted (App. 7), and the Government conceded (App. 11), that the involved Special Internal Revenue Agents "were focusing on this defendant" from the outset and that the IRS never had any civil intention with respect to petitioner. Further, it was clear, and the judge took into account, that petitioner had been labeled as a target by the Justice Department and the criminal investigation conducted thereafter was directed only at returning an indictment against him. (See Press Release App. 69)[1]

Evidence at this hearing showed that petitioner was a 44-year old, black, ninth-grade dropout who never had any contact with the preparation of tax returns. Although he had had an accountant file returns for him in the past, he had never personally prepared nor filed a tax return in his entire life and, although he had been once previously arrested in 1963, he had never theretofore

[1]This Press Release was considered by the trial judge (App. 62) and appeared in the record below at R. 7, p. 14, Exhibit A.

been advised of his constitutional rights to counsel and against self-incrimination. (App. 44-45.) After the interview, petitioner felt he had said nothing to incriminate himself (App. 48.).

The two Special Agents who conducted the August 2, 1972 interview testified that they were members of the Intelligence Division and their function was exclusively concerned with criminal violations of the Revenue laws. On said date they made their initial unannounced appearance at petitioner's home at 8:00 A.M. After petitioner finished dressing, they read to him from a form card printed by the Internal Revenue Service (App. 46-47) (R. 7, p. 15) (App. 65-66). More than four months prior to March of 1972, they had received a tip from a confidential informant (App. 9). Between March 29 and August 2, 1972, Agent Peterson and another agent did "a considerable amount of investigation about" petitioner (App. 11-12). It was Agent Peterson's purpose to interview petitioner and the second Special Agent was present as a witness (App. 13-14) Both Agents were armed (R. 19).

As is apparent, the Agents' warning to petitioner gave some advice as to his constitutional right to silence and counsel, but fell short of the minimum rights required by this Court in *Miranda v. Arizona,* 384 U.S. 436. Petitioner was not told "he had a right to remain silent or not to answer any questions." Nothing was said to petitioner "about net worth or about proving understatement of income or cash expenditure theories or anything like that" (App. 18). Indeed, after question-

ing petitioner for from fifteen to thirty minutes, Special Agent Peterson felt it necessary to determine if petitioner was able to read. The card was not signed by petitioner and petitioner was not asked to sign any waivers with regard to answering questions (App. 20-21). About this time, the agents learned that petitioner had a very limited education and that he had had no instruction in accounting or tax returns. The questioning continued from 8:00 A.M. until 11:00 A.M. without a break. (App. 22.) At that time the Special Agents requested that petitioner produce corporate books and records from the store where he was employed. Without seeking the advice of counsel, petitioner took the Special Agents directly to his place of business and turned over the requested records. (App. 27.)

In June of 1973, petitioner was indicted via original action of the Grand Jury and these Special Revenue Agents, accompanied by two agents from the Bureau of Narcotics and Dangerous Drugs, effected petitioner's arrest at his place of business. Petitioner has never been arrested for, nor charged with, the violation of any narcotic law.

Thereafter, the trial judge denied defendant's motion to suppress these statements and everything that flowed from them. (Pet. App. 1b-2b.) In entering into Stipulation No. 2 which formed the entire basis for the net worth theory of prosecution of the Government, it was clear that petitioner did not waive his challenge to the legality of the interview and the admissibility of said statements at trial.

SUMMARY OF ARGUMENT

The entire starting point for the "new worth" criminal understatement tax prosecution of petitioner was obtained from his own statements during an interview with agents from the Intelligence Division of the Internal Revenue Service. At the time of the interview these agents who have an exclusively criminal function were "legally harassing" petitioner by utilizing the tax laws to punish him for suspected, but unprovable, narcotic violations. Despite the fact that the investigation had reached the "critical" accusatory stage, petitioner was not accorded the full advice of rights dictated by *Miranda v. Arizona.* In addition, the interview of petitioner must be viewed in the light of the self-declaring nature of our tax system and its very complexity, the confusion on the part of taxpayers between the civil and criminal function of interviewing agents, and taxpayers' fears with respect to the economic and social consequences of non-cooperation. These factors combine with intentional IRS practices designed to frustrate the exercise of constitutional rights and create psychological restraints upon one in petitioner's circumstances severely limiting his freedom of action. Petitioner's Motion to Suppress in the District Court should have been granted.

Because there is some previous indication of fraud before a tax case is transferred to a Special Agent and because criminal tax defendants are rarely arrested, it is submitted that this administrative change of focus from civil to criminal, and not arrest, should constitute the point at which *Miranda* requirements attach.

In the light of the extreme Government focus upon petitioner and his disadvantaged position stemming from the complexity of the tax laws, the involved interview constituted a fundamentally unfair confrontation. The agents' failure to give full warnings combined with present IRS interviewing practices designed to obviate the assistance of counsel and to encourage self-incrimination so as to violate due process law.

No constitutionally permissible countervailing reason exists for the Government to continue refraining from the giving of full warnings since the burden of corrective action is minimal.

ARGUMENT

AS THE TARGET OF LEGAL HARASSMENT BY WAY OF AN EXCLUSIVELY CRIMINAL TAX PROBE PETITIONER WAS ENTITLED TO FULL MIRANDA WARNINGS

A. At the Time of the Critical August 2, 1972 Interview, the Investigation Had Reached the Accusatory Stage.

1. Extreme focus.

The involved special agents testified that their investigation of petitioner commenced in March of 1972, more than four months prior to their unannounced interview (App. 9). There was no civil audit by revenue agents that could be thought of as routine or done at random. The trial judge assumed (App. 7) that there was never any civil intention on the part of the Government with respect to petitioner. Income tax violators are seldom arrested,[2] petitioner not only was subjected to arrest, but it was effected by the combined forces of revenue and

[2]See Weiss, 25 *Journal of Taxation* 26 (1966) at 27.

narcotic agents (App. 39). After his arrest, the local United States Attorney explained the prosecution's unusual interest in petitioner by way of press release which in part read:

> Sources in the U.S. attorney's office said the indictment was part of a continuing program that has been described by that office as "legal harassment" of persons whom they believe to be connected with underworld narcotics activity here (App. 66).

Neither the authenticity nor the accuracy of this release has been disputed at any time by the United States. It was presented to the trial judge and considered by him (R. 7, p. 14, Ex. A, App. 62, 69).

Petitioner has never been arrested for or charged with any narcotic offense. The peculiar focus with which the Government regarded peitioner in 1972, however, emphasizes the need for his being accorded full *Miranda* warnings. When the special agents visited petitioner, it was not for the purpose of seeing whether a tax crime had been committed, nor was it, as the Court of Appeals erroneously thought, because of gambling activities (Pet. App. 2(a)), but rather because of suspected, but unprovable, narcotics trade involvement. While the Government properly brings its taxing power to bear upon the relatively innocuous activity of gambling in order to avoid the loss of taxable revenues, different Government interests are involved with suspected narcotic trafficking; incarceration, not revenue, is the goal of law enforcement agents.[3] Petitioner submits that in these circumstances

[3]From the fact that a maximum sentence, maximum fine and court costs were imposed, it must be inferred that the sentencing judge held similar views. Petitioner's record prior to this case consisted only of two minor gambling violations in the mid-1960's.

[footnote continued]

the Constitution entitles him to a full and fair warning as to his privilege against self-incrimination and right to counsel before the official harassment and the complexities of the tax laws combine to convict him out of his own mouth.

It is clear that the minimal procedural requirements of *Miranda v. Arizona,* 384 U.S. 436, apply to tax investigations. *Mathis v. United States,* 391 U.S. 1. It is also well-established that the mere fact that the interview took place in petitioner's home does not relieve the Government of the duty to comply with the minimum requirements of *Miranda. Orozco v. Texas,* 394 U.S. 324.

The Court of Appeals rejected petitioner's *Miranda* argument on the ground that he was not in full custody at the time of the interview. Petitioner respectfully submits that in so doing the Court erroneously ignored the record showing of extreme prosecutorial focus upon him.

The *Miranda* Court defined "custodial interrogation" as

> questioning initiated by law enforcement officers after a person has been taken into custody *or otherwise deprived of his freedom of action in any significant way* (384 U.S. at 436). (Emphasis added.)

In footnote 4 of that opinion, this Court said

> [t]his is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused.

The more typical tax evasion sentence is exemplified by that of Sherman A. Thomas, a District of Columbia doctor who was convicted of evading $21,213.18 in income taxes and sentenced to a two-month term of incarceration. *United States v. Sherman,* U.S. Dist. Ct. D.C. Docket No. 74-187.

In *Escobedo v. Illinois,* 378 U.S. 478, Danny Escobedo was arrested on suspicion of murder and taken to a police station for questioning. While being interrogated and without being advised of his Constitutional rights, Escobedo made statements admitting knowledge of the murder. In reversing his conviction, this Court held that a suspect is entitled to consult counsel during interrogation; that the interrogators were not engaged in "a general investigation of 'an unsolved crime' " but that their "purpose [was] to 'get him' to confess his guilt . . ."[4] Because the investigation had "begun to focus on a particular suspect," the "process [had shifted] from investigatory to accusatory .,. . and its purpose [was] to elicit a confession."[5]

Citing *Michigan v. Tucker,* 94 S.Ct. 2357, 2361, the United States argued below that *Escobedo* was "not to be broadly extended beyond the facts of that particular case." (Appellee's Brief pp. 8-9.) Petitioner submits that the *Tucker* decision was not addressed to the issue of entitlement to warnings. In that case the failure of the police to warn Tucker of his right to appointed counsel brought the case to the highest court; the issue was whether, given a *Miranda* violation, other evidence which the police uncovered by virtue of Tucker's statements need be suppressed. The Supreme Court said "no" in a limited opinion emphasizing that the trial judge has suppressed Tucker's own statements (94 S.Ct. at 2364) and the Court

> consider[ed] it significant to [its] decision . . . that the officer's failure to advise respondent of his right

---

[4]Escobedo, supra, 378 U.S. at 485.

[5]Id. at 492.

to appointed counsel occurred *prior* to decision in *Miranda*. (94 S. Ct. 2365.) (Emphasis added.)

Escobedo was mentioned in the Tucker opinion only to point out that *Escobedo* did not compel the extreme exclusionary rule sought by the petitioner when the admittedly insufficient warnings had been given by the police prior to the date of the *Miranda* decision.

Rather than restricting *Escobedo,* it is clear the *Miranda* sought to extend it. On the same page that this Court cited *Escobedo* as explaining "custodial interrogation," the *Miranda* opinion reads:

> It was necessary in *Escobedo,* as here, to insure that what was proclaimed in the Constitution had not become but a "form of words," *Silverthorne Lumber Company v. United States,* 251 U.S. 285, 392 (1920), in the hands of Government officials. And it is in this spirit, consistent with our role as judges, that we adhere to the principles of Escobedo today. (384 U.S. 436, 444.)

Adopting the shift "from investigatory to accusatory" as its touchstone the Seventh Circuit requires the IRS to administer full *Miranda* warnings whenever a tax investigation shifts to the Intelligence Division. In *United States v. Dickerson,* 413 F.2d 1111, the court relied heavily upon a District Court decision, *United States v. Turzyanski,* 268 F.Supp. 847, where the District Court stated:

> [O]nce a taxpayer becomes the subject of a criminal tax investigation, as evidences by the referral of the investigation to the Intelligence Division or otherwise, our adversary process of criminal justice has become directed against him as a potential criminal defendant. Any evidence obtained from him is admissible only if the taxpayer furnished it after knowingly and voluntarily waiving his Constitutional rights and privileges.

> To hold otherwise would lead to the anomalous conclusion that a person suspected of bank robbery, sale of narcotics, murder, rape or other serious crime is entitled to greater protection of his constitutional rights than a person suspected of violating the internal revenue laws. For when the silent transition from civil to criminal investigation takes place in a tax case, the taxpayer being interrogated and asked to furnish his books and records is just as surely a prime suspect and candidate for criminal prosecution as the individual under interrogation as a suspect for other crimes. Id. at 850-851.

A leading law review commentator analyzes this issue as follows:

> . . . in a non-custodial interrogation, the duty to warn may depend on the purpose of the inquiries, which in turn may be ascertained by gauging the degree of the interrogator's suspicion. If the questions are put by one who 'knows' the suspect is guilty and who, consequently, is engaged in building a case rather than investigating a possible crime, then his subject may deserve the *Miranda* warnings, even though not under arrest . . .
>
> A supporting rationale might be that viewing the matter as of the time of the interrogation, the greater the likelihood that statements obtained will in fact be offered in a criminal prosecution, the less likely that the defendant would be willing to waive his privilege, and consequently, the greater the need for assuring that he knows of his rights. Duke, "Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid," 76 *Yale L.J. 1,* 38 (1966)

The Seventh Circuit fully appreciates the effect of the Government's targeting a defendant for prosecution. In *United States v. Oliver,* 505 F.2d 301, 304-305 that Court said,

> The fact of custody is emphasized in the opinion as having the practical consequence of compelling the accused to make disclosures. But the test also differentiates between the questioning of a mere witness and the interrogation of an accused for the purpose of securing his conviction; the test serves the purpose "of determining when the adversary process has begun, i.e., when the investigative machinery of the Government is directed toward the ultimate conviction of a particular individual and when, therefore, a suspect should be advised of his rights." (Footnotes omitted.)

It is respectfully submitted that taking a suspect into custody was not the *sine qua non* of *Miranda* for requiring police to administer warnings.[6] The *Miranda* court viewed that one circumstance as the ordinary and readily definable turning point in a criminal proceeding:

> "It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries." 384 U.S. at 477.

In a tax investigation, it is when the Government focuses upon the suspect as an accused and not when he is physically restrained that *Miranda* warnings must be given. This is so, because arrests for tax fraud are rare.[7] Usually the first actual physical restraint upon a

[6]See United States v. Phelps, 443 F.2d 246 (5th Cir.); Brown v. Beto, 468 F.2d 1284 (5th Cir.); Randall v. Estelle, 492 F.2d 118 (5th Cir.); United States v. Garcia, 496 F.2d 670 (5th Cir.) Ancira v. State, 516 S.W.2d 924 (Tex. 1974).

[7]See Andrews, The Right to Counsel in Criminal Tax Investigations under Escobedo and Miranda: The "Critical Stage," 53 Iowa L. Rev. 1074 at 1085:

> It is only after an indictment is obtained that the taxpayer will be taken into custody.[56]
>
> [56]The concept of "custody" is foreign to the normal criminal tax investigation apparently because neither

[footnote continued]

> defendant is when he appears for sentencing (probably after he has exhausted his appellate rights) and surrenders to the U.S. Marshals to commence serving his sentence.
>
> Anyone familiar with IRS investigations knows that arrests in tax cases prior to indictment are virtually unknown, and arrests after indictment are highly unusual. * * * Weiss, 25 *Journal of Taxation* 26 at 27.

As will be shown hereafter, petitioner was under grave psychological restraints at the time of the involved interview and the Governmental action was fundamentally unfair. However, it is submitted that extreme focus in this case alone dictated that the agents administer full *Miranda* warnings. The Court has often held that the constitutional rights to be free from self-incrimination and to seek counsel deserve a greater protection after indictment. *Spano v. New York,* 360 U.S. 315; *Massiah v. United States,* 377 U.S. 201; *Hamilton v. Alabama,* 368 U.S. 52; *White v. Maryland,* 373 U.S. 59. See *Gideon v. Wainright,* 372 U.S. 335. While in this case at the time of the August 2, 1972 interview Petitioner had not yet been indicted, he was indicted virtually or putatively in the minds of the law enforcement agents. Since arrests are so infrequent in tax cases, the lack of physical restraint looms as insignificant.

In *Massiah, supra,* this Court rejected the Government's argument that the fact Massiah's liberty was not restrained somehow did not entitle him to the same constitutional protections as a man in custody.

> It is true that in the *Spano* case the defendant was interrogated in a police station, while here the

> flight of the suspect nor further criminal conduct is expected to occur and the crime itself is of a non-violent nature * * *

damaging testimony was elicted from the defendant without his knowledge while he was free on bail. But, as Judge Hays pointed out in his dissent in the Court of Appeals, "if such a rule is to have any efficacy, it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a Government agent. 377 U.S. 201, 206.

2. Critical stage

A civil investigator is required, whenever and as soon as he finds "definite indications of fraud or criminal potential," to refer a case to the Intelligence Division for investigation by a different agent who works regularly on criminal matters. * * *

Mathis v. United States, 391 U.S.1, 6 (n.2, Mr. Justice White dissenting); see *United States v. Turzyanski,* 268 F.Supp. 847, 850 (N.D. Ill.). Petitioner submits that after such a transfer from the civil agent to the Intelligence Division has taken place, all interviews between special agents and a taxpayer constitute "critical stages" for the taxpayer. This is so because of the following unique aspects of the criminal tax investigation:

a. There is never any question concerning criminal agency or identity. If a tax violation has occurred, the suspect is responsible.

b. There is no longer any civil function of the Internal Revenue Service by virtue of the assignment of an exclusively criminal investigator.

c. The existence of a criminal violation is virtually certain because of the preceding civil audit or, as in this case, because of the Government's decision that the tax

laws be utilized to punish the taxpayer for unrelated matters.

The "critical stage" of the criminal process has traditionally moved this Court to fashion safeguards to protect constitutional rights jeopardized at these crucial junctures in a criminal case. Beginning in 1932 with *Powell v. Alabama,* 287 U.S. 45 (period between arraignment and trial) and continuing in *Spano v. New York, supra* (interrogation after indictment), *Hamilton v. Alabama,* 368 U.S. 52 (arraignment), *White v. Maryland,* 373 U.S. 59 (preliminary hearing); *Massiah v. United States, supra,* (postindictment—defendant free on bond); *Escobedo v. Illinois, supra* (post-arrest interrogation); *Miranda* and through *United States v. Wade,* 388 U.S. 218; *Gilbert v. California,* 388 U.S. 263 (lineup identification); *Stovall v. Denno,* 388 U.S. 293 (preindictment showup identification), the Court has demonstrated a willingness to analyze a case and determine when there existed a Government focus on the accused and a concomitant need on the part of an accused to have his constitutional rights protected. These cases demonstrate that the "critical stage" is not a wooden concept but changes with differing fact patterns sometimes in the light of differing state laws and procedures. Compare *White v. Maryland, supra,* and *Pointer v. Texas,* 380 U.S. 400 at 402. As noted above, the Government had focused on petitioner four months prior to the interview; as will be demonstrated, petitioner was in great need of constitutional safeguards as is evidenced by the fact that he provided the starting point for the entire net worth prosecution out of his own mouth.

The "critical stage" doctrine provides the vehicle for the extension of the right to counsel to the criminal tax investigation over the objection that the

tax investigative procedure is "non-custodial." Common sense would seem to require it, and fairness to the taxpayer compels it. *Andrews, The Right to Counsel in Criminal Tax Investigations under Escobedo and Miranda:* The "Critical Stage," 53 *Iowa L. Rev.* 1074, 1117 (1968)[8]

B. Interrogations by Tax Agents Involve Coercive Elements Equivalent to Station House Interrogation.

The visit from the tax investigator has a psychologically coercive effect upon the taxpayer because of the following factors:

1. The self-declaring nature of the tax laws;

2. The justified assumption on the part of the average taxpayer that he is merely discussing a civil obligation;

3. The relative ignorance of taxpayers regarding what constitutes a criminal violation or incriminating statements under the tax laws;

4. IRS practices designed to jeopardize constitutional rights.

5. The taxpayer's justifiable fear that non-cooperation will prove very expensive and embarrasing.

1. The United States employs a self-taxing system.

> Our Constitution is in actual operation; everything appears to promise that it will last; but in this world nothing is certain but death and taxes.[9]

In this country, not only are taxes certain, but the law requires a filing of returns, the keeping of records, and

---

[8]State courts have adopted this approach in applying Miranda. State v. Godfrey, 131 N.J.Super 168, 329 A.2d 75; People v. Layton, 29 Cal. App. 3rd 349, 105 Cal. Reptr 409; People v. Collin, 232 Cal. App.2d 681, 43 Cal. Rept. 57.

[9]Benjamin Franklin letter to M. Leroy, 1789.

the providing of almost any kind of information the Revenue Service requires.[10]

Against this "self-declaring" backdrop this Court must view petitioner's case. The myriad compulsory civil obligations naturally lead the average citizen to believe he has no choice but to answer any and all questions put by tax agents concerning his income. He is accustomed to providing information without specific request every April 15 (or more often during a year). It is all the more natural for the average taxpayer to assume he must cooperate when actually visited by revenue agents. "Only the rare taxpayer would be likely to know that he could refuse to produce his records to IRS agents." *United States v. Dickerson,* 413 F.2d 1111, 1116 (7th Cir.).

---

[10]See 26 U.S.C. §7203, Internal Revenue Code of 1954 as amended

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under the authority thereof to make a return . . ., keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations shall, in addition to other penalties provided by law, be guilty of misdemeanor and, upon conviction thereof, shall be fined not more than $10,000.00, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

For the almost myriad list of returns, records, statements, etc. that can be required by the Internal Revenue Service, see Internal Revenue Code 1954, Subtitle F, Chapter 61, 26 U.S.C., §6001 through 6110. Of particular significance is §6001, which reads in pertinent part

> Whenever in the judgment of the Secretary or his delegate, it is necessary, he may require any person, by notice served upon such person or by regulations, to make such returns, render such statement, or keep such records, as the Secretary or his delegate deems sufficient to show whether or not such person is liable for tax under this title.

2. Most citizens justifiably feel they are discussing an exclusively civil matter.

In 1965 less than 3/10 of 1% of all returns audited were carried beyond the routine audit and civil deficiency stage. Even after a special agent was assigned to investigate a taxpayer, the chances were about 7 in 8 that prosecution would not be recommended.[11] In 1969 only 2,080 full-scale tax investigations were undertaken by the intelligence divisions. Only 1,049 resulted in recommendations for prosecution. In the cases not recommended for prosecution some $20,000,000 in deficiencies and penalties were earmarked for civil collection.[12]

> A visit from the tax man may be an unpleasant experience but both innocent and guilty taxpayers usually assume that all the tax man wants to talk about is *money*. That is, indeed, the purpose of most tax investigations. Not so, however, when a special agent of the Intelligence Division enters the picture.
>
> The average taxpayer does not know the difference between a special agent and a Revenue agent, and he is not made aware of the difference by any statement or warning that is adequate to the purpose. Indeed, much of the difficulty stems from the essential unfairness of the techniques employed by the investigating agents. *Lipton Constitutional Rights in Criminal Tax Investigations*, 45 F.R.D. 323, 337 (footnotes omitted).

Courts recognizing this basic misunderstanding on the part of taxpayers have required full *Miranda* warnings:

---

[11]Duke, *supra* p. 13, 76 Yale L.J. 1, 35; 1965 Ann. Rep. of Comm. of Int. Rev. 23.

[12]Donaldson v. United States, 400 U.S. 517, 535 n. 17, citing 1969 *Ann. Rept. of Comm. of Int. Rev.* 28-31.

> Incriminating statements elicited in reliance upon the taxpayer's misapprehension as to the nature of the inquiry, his obligation to respond, and the possible consequences of doing so must be regarded as equally violative of constitutional protections as a custodial confession extracted without proper warnings.

United States v. Dickerson, 413 F.2d 1111, 1116 (7th Cir.).

> The practical effect of these misapprehensions during questioning of a taxpayer was to "compel" him to provide information that could be used to obtain his conviction in a criminal tax fraud proceeding, in much the same way that placing a suspect under physical restraint leads to psychological compulsion.

United States v. Oliver, 505 F.2d 301, 305 (7th Cir.). A leading author in this area has noted that uneducated taxpayers such as petitioner are not the only individuals guilty of this misapprehension. His theories also explain the imbalance[13] in the Circuit Courts of Appeal on the issue here involved:

> Trends in tax prosecution have for at least two decades been continuously running against the main currents in criminal procedure. By subtle doctrinal manipulation, the courts confer more and more discretion on invoking officials and reduce the roles of judge and jury. The judge's role is limited by his abdication of responsibility to define the offense and to determine the sufficiency of evidence. The jury's function is restricted by a procedural panoply

---

[13]For a list of cases contrary to the Seventh Circuit position espoused herein and by most law review commentators see footnote 2 of the "Memorandum for the United States" (p.3) filed in response to the petition for certiorari in this case.

which prevents a full and fair test of the Government's proofs.

The main support for a different course of doctrinal development in tax prosecutions than in criminal procedure generally is the fact that civil and criminal sanctions apply to the same conduct and are invoked by the same officials. Tax agents act in a dual capacity, making their investigations ambiguous and creating powerful pressures for self-incrimination. Courts frequently confer procedural advantages upon the Government, and deny them to the accused, by labeling the problem as one of "civil" or "criminal" procedure, as the context requires. A tax prosecution is a procedural hybrid.

Duke, op cit. 76 Yale L.J. 1, 2-3.

3. The very complexities of the tax laws create a heightened need for awareness of constitutional rights to silence and to counsel.

This Court has found it neccssary to ensure that citizens charged with common law crimes such as murder (Escobedo) and rape (Miranda) surrender constitutional rights only in a knowing and truly voluntary manner. Thus, *Miranda* set down minimum "prophylactic" objective requirements without which statements could not be admitted into evidence. Petitioner acknowledges that any legal proceeding may be complex, but points out that on the whole a citizen appreciates what he is up against in terms of potential consequences when arrested for these common law offenses. This is not true of the tax laws. That the tax laws of this country are a maze of complexities to all but the specialist is an irrefutable proposition.[14]

[14]See generally Surrey, "Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail," 34 *Law and Contemporary Problems* 673 (1969).

It has even been argued that this Court lacks the necessary expertise in this area:

> If we were trained in the art and science of taxation, we might serve a useful function. But taxation is a specialty in which we have only sporadic and no continuous experience. * * *
>
> It is therefore the rare tax case we should consider, except the even rarer Constitutional case. Mr. Justice Douglas dissenting in *United States v. Skelly Oil Company*, 394 U.S. 678, at 690-691.

Alone in an interview with the experienced agent[15] from the Intelligence Division, who has prepared for the interview (in this case for four months), the average taxpayer is at a distinct disadvantage analogous to the predicament of the rape suspect within the confines of the police station. However, the rape suspect under interrogation (whether guilty or innocent) has a much better grasp and appreciation of what is or is not incriminating and is thus in a better position to make an intelligent decision whether to waive his constitutionally protected right to silence. The complexity of the tax laws deprives all but the most sophisticated of their right to intelligent choice.[16]

[15]See Committee on Tax Policy 1970-1971 New York State Bar Association, Tax Section, "A Report on Complexity and the Income Tax," 27 *Tax Law Review* 325 at 330

> Nor should we ignore the impact of complexity and ambiguity on corruption in the administration of the tax law. It was only ten years ago that in at least one region of the country substantial bribery and corruption were discovered. A revenue agent's proficiency in technicalities that if applied would adversely affect taxpayers, but the non-application of which cannot be detected on review, affords temptation to Internal Revenue officials and taxpayers alike.

[16]See *Miranda, supra*, 384 U.S. at 444: "The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently."

This case presents a striking example of how these complexities work to foster unwitting self-incrimination. The legally significant results of the special agents' interview are embodied in stipulation No. 2 (App. 70-71). Petitioner told the agents that between 1965 and 1969 he never had more than $300 cash on hand, that his cash on hand increased $700 in 1970 and by $500 in 1971, that for 1971 he did not incur any expenses which were tax deductible and not reflected on his return, that from 1960 to August 2, 1972, he received no inheritance or gifts of money.

As would be the case with most people, petitioner obviously thought his statements regarding these modest amounts were serving his interest and probably minimizing any potential civil deficiency.[17] On the contrary, out of his own mouth he had given the prosecution proof of the most essential and significant element in a net worth criminal understatement case, the *starting point.*

> [A]n essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets. The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset. * * * *Holland v. United States* 348 U.S. 121, 132.

The involved agents acted in conformity with usual IRS practices in obtaining such verbal admissions from defendant with an intent to use them in later prosecu-

---

[17]Whether these statements were true or false is, of course, not significant for *Miranda* purposes. "[T]he prosecution may not use statements, whether exculpatory or inculpatory, ..." 384 U.S. 436 at 444.

tion. See *Duke, supra,* 76 Yale L.J. 1 at 16-20, "Defendants' Admissions—A Bedplate of the Typical Case." This Court has taken specific note of the inherent psychological pitfalls present in an interview between a tax agent and unsophisticated taxpayer:

> 5. In many cases of this type, the prosecution relies on the taxpayer's statements, made to revenue agents in the course of their investigation, to establish vital links in the Government's proof. But when a Revenue agent confronts the taxpayer with an apparent deficiency, the latter may be more concerned with a quick settlement than an honest search for the truth. Moreover, the prosecution may pick and choose from the taxpayer's statement, relying on the favorable portion and throwing aside that which does not bolster its position. * * * *Holland, supra,* 348 U.S. 121, 128-129.

In addition, this Court has recognized the untrustworthiness of such statements by requiring corroboration. *United States v. Calderon,* 348 U.S. 160; *Smith v. United States,* 348 U.S. 147.

Petitioner does not request any rule requiring agents to educate a taxpayer prior to an interview. However, for purposes of assessing the existence of psychological restraint, it is emphasized that the interviewee is adrift on a sea of complexity without a paddle or guiding star and unlike the suspect who is the focus of a common law crime, the taxpayer has no starting point from which to assess the possibility of self-incrimination. Lack of education and ignorance of one's rights have traditionally been a substantial consideration on the part of this Court in assessing voluntariness. *Haley v. Ohio,* 332 U.S. 596; *Paine v. Arkansas,* 356 U.S. 560; *Bumper v. North Carolina,* 391 U.S. 543.

4. Agents are trained to discourage the free exercise of constitutional rights.

The Internal Revenue Service Audit Technique Handbook §10.90(2) requires that a Revenue agent

> immediately suspend his investigation, *without disclosing to the taxpayer or his representative the reason for his action,* when he discovers what he believes to be in indication of fraud. * * * *United States v. Lockyer,* 448 F.2d 417, n.2 (10th Cir.). (Emphasis added.)

Thus, the taxpayer has no way of knowing when the tax investigation has turned critical or criminal for prosecution purposes. At best when a special agent identifies himself as such, this has no effect upon the taxpayer in making him realize he is the subject of a criminal investigation.[18]

Revenue agents are trained to obviate the involvement of counsel. See "Internal Revenue Service Training No. 3158-01(5-73)" *CCH Federal Tax Reports* No. 29, June 6, 1973 §2.034 *"Initial Contact"*

> We strongly emphasized making the initial contact with the taxpayer, *not with his representative.* * * * (Emphasis added.)

Also see the same training manual for an illustration of how agents are trained in the necessity of obtaining incriminating statements.

---

[18]See Duke, *supra*, p. 36.

> [V]irtually all [courts] hold that a special agent who merely identifies himself as a "special agent" or "from Intelligence" has given the taxpayer all the warning he deserves, despite the probability that not one taxpayer in twenty knows that this means a criminal investigation.

3.04 *"Cash on Hand at Beginning of Period"*

> It is important to get complete information about non-taxable income as your efforts may be wasted if a taxpayer later provides information regarding a non-taxable source of funds which explains the understatement. This is especially true of cash on hand or cash hoard. This information is a must in every indirect method. The best adjustment for unreported income will be lost if this item is not determined from the beginning. Once the taxpayer is faced with an understatement, he will try to explain it. He cannot use the defense of "cash in the mattress" if he has already furnished the amount.

This entire training manual seeks to foster a spirit of "getting the taxpayer to talk."[19] While these methods may serve to facilitate the collection of taxes, they are strikingly similar to the psychological, tongue-loosening devices mentioned in *Miranda v. Arizona,* which this Court sought to guard against in its holding in that case (384 U.S. 436, 448-455).

5. During an interview a taxpayer experiences justifiable social and economic fears which compel cooperation.

[T]he existence of the criminal sanction, the dread with which most taxpayers regard involvement in criminal proceedings, the vagueness of the crime, and the enormous discretion of the investigator,

---

[19]For example, see §4.013, *Purpose of Interview,*

> [H]e should conduct himself to establish the confidence of the taxpayer as early in the examination as possible. Begin the discussion by commenting on the topic of apparent interest to the taxpayer. Display pleasant emotional responses and avoid unpleasant expressions. Do not immediately attempt to discuss involved technical matters but keep the conversation informal and easy. * * *

> make non-cooperation by an audited taxpayer in most cases an inordinately foolish decision. The civil aspects of an audit also point toward cooperation. The return of almost any taxpayer contains items upon which an obdurate agent can assert a deficiency which is both difficult and costly for the taxpayer to resist.[20] Non-cooperation may be very expensive. *Duke*, op. cit., page 35.

Also, the fact that the taxpayer is aware of the agent's ability to make inquiries among the taxpayer's friends, associates, clients and customers is a powerful inducement to cooperation. These inquiries are harmful, if not ruinness, to one's reputation.[21]

> [D]irect confrontations productive of such incriminating evidence are inherently "coercive" in the psychological sense. The agents personify the authority of the Federal Government, and the ordinary taxpayer does not have either the "technical knowledge" of his rights or the "toughness" of fiber"[22] to decline to answer their questions despite the fact that he may have been warned that anything he says may be used against him. The mere fact of such questioning will inevitably produce some "compulsions" on the mind of the taxpayer. Beyond that, manifold other factors may pressure

---

[20]Over and above the expense and inconvenience an Agent can cause by demanding a full scale audit, he can cause the taxpayer to suffer an assessment for a deficiency. Upon such assessment it is the burden of the taxpayer to bring legal proceedings to prove the deficiency is being erroneously assessed. See 1954 *Internal Revenue Code* as amended 26 U.S.C. §§6212 and 6213.

[21]See "Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary" 1179-83; Duke, op. cit., n. 160 p. 35.

[22]United States v. Maius, 378 F.2d 716, 719 (6th Cir.) *cert. den.* 389 U.S. 905.

> the taxpayer into "cooperation," including the desire not to increase the agents' suspicions, the intent to appease the agent so that he will not assert the deficiency based upon otherwise proper deductions difficult to prove in court, and the all too common belief that if he cooperates he will be allowed to "pay up" the deficiency and thereby avoid the imposition of criminal sanctions. In addition, at the formal interrogation stage the coercive inducements to appear and give testimony increase. The letter of invitation impliedly threatens prosecution if the taxpayer does not appear and offers the hope of avoiding prosecution if he does appear. * * * All these factors combine to pressure the taxpayer to give verbal statements and turn over documentary evidence to agents at all stages of the criminal tax investigation. Surely, there are present, in reality, such psychological factors operating on the mind of the suspected tax evader as "to disable him from making a free and rational choice." Andrews, op. cit., pages 1112-1114.

6. The combined effect of all of the above.

At least one member of this Court has recognized the coercive effects of these interviews. In dissenting from the denial of *certiorari* in *Thomas v. United States*, 386 U.S. 975, Mr. Justice Douglas stated that he

> would grant this petition on the fourth question. It concerns the apparent practice of Internal Revenue agents in examining taxpayers and using the evidence obtained in criminal prosecutions when the taxpayers are given no warning as to their rights including the right to have an attorney present. This is not an in-custody case, but it is a *coercive* examination of a taxpayer at a *critical* preliminary hearing, so to speak, and the question presented apparently is a recurring one. (Emphasis added.)

While, as the United States emphasizes in its response to the petitioner for *certiorari* in this case, ten Circuits have held contrary to the Seventh Circuit on this issue, petitioner hastens to point out that nearly all of the scholars and law review commentators support petitioner's view. See Andrews, "The Right to Counsel in Criminal Tax Investigations under Escobedo and Miranda: The 'Critical Stage,' " 53 *Iowa Law Review* 1074; Duke, "Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid," 76 *Yale L.J.* 1, 1966; Weiss, 25 *Journal of Taxation* 26, 1966; Lipton, "Constitutional Rights in Criminal Tax Investigations," 45 F.R.D. 293, 1968; Skees, 46 *Indiana L.J.* 361, 1971; Weinstein, "Constitutional Rights of a Taxpayer in Criminal Tax Investigations," 16 *J. Pub. Law* 403, 1967; Simmons, "The Shift of Emphasis Theory: Constitutional Rights of Taxpayers in Criminal Fraud Investigations in Light of *Miranda v. Arizona,*" 20 *Syracuse L.Rev.* 725 (1969); *Forrester,* "Constitutional Rights of the Taxpayer in a Tax Fraud Investigation," 42 *Tulane L.Rev.* 862 (1968); *Lay,* "Right to Counsel in Criminal Tax Investigations," 43 *Ind. L.J.*, 69 (1967).

The Seventh Circuit appreciates the psychological restraints arising from the above-noted factors. *United States v. Oliver, supra; United States v. Dickerson, supra.* See also, District Judge's Opinion in *United States v. Dickerson,* 291 F.Supp. 636, 637:

> "It would seem to us that the average citizen, faced with repeated questioning by two Government agents is in an ominous situation to say the least. The Government suggests that the defendant was in no way physically restrained, but we doubt that he really felt free to walk out on the investigators from the Internal Revenue Service. In the absence of sufficient warnings and the assistance of counsel,

> there are innumerable factors which act on the taxpayer's mind compelling him to 'co-operate' with the Federal authorities."

In the light of values the *Escobedo* and *Miranda* decisions sought to protect, the fact situation here dictates the requiring of full warnings much more so than the facts in *Mathis v. United States,* 391 U.S.1. *Escobedo* and *Miranda* sought to foster the free exercise of the constitutionally protected rights to counsel and to be free from compulsory self-incrimination. As the fact patterns in *Escobedo* and *Miranda* make clear, the specific concern of the court was to discourage "compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda,* 384 U.S. at 436.

In *Mathis* the interview resulting in incriminating statements was conducted by a civil Revenue agent. At that time there existed no focus upon the taxpayer as a potential accused in a tax fraud prosecution and, thus, no motive for overbearing on the part of the agent. In addition, Mathis experienced no heightened compulsion due to his confinement. He was serving a state sentence in a Florida institution and was ostensibly familiar with the circumstances of his confinement. Since the interrogators there did not have control over his confinement the potential abuses listed in *Miranda* were minimized. Obviously, in the light of its holding, the *Mathis* court felt the circumstances potentially coercive; however, the *Miranda* opinion suggests concern with a restraint which was directly related to the questioning.[23]

---

[23] "Accordingly, we hold that an individual held for interrogation must be clearly informed . . ." 384 U.S. at 471.

Here extreme Government focus and potential for zealous overbearing by the Government combined to create more intense pressures during the interview of petitioner. Already being incarcerated, Mathis did not have as much to lose as did petitioner from expense and embarrassment of a full-scale tax audit and financial inquiries among friends, customers and business associates.

C. The Investigative Procedure Here Used Is Violative of Due Process.

The investigative procedure actually used by special agents Peterson and Fornili in interviewing petitioner, one wholeheartedly approved by the IRS,[24] is one which is fundamentally unfair and which directly impinges the free exercise of substantive rights of potential criminal defendants in violation of the Fifth Amendment due process clause.

The *Miranda* and *Escobedo* cases set forth the "threshold" procedural requirements necessary to protect certain "basic rights that are enshrined in our Constitution," *Miranda, supra,* 384 U.S. 436 at 442, namely, the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to the assistance of counsel. The privilege against self-incrimination is "the essential mainstay of our adversary system" and requires that

> [T]he Government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth . . . In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered

[24]See IRS Training No. 3158-01 (5-73), op. cit.

> exercise of his own will." (Citations omitted.) *Miranda v. Arizona,* 384 U.S. 436, 460.

The Sixth Amendment right to counsel buttresses the privilege against self-incrimination. Counsel informs the accused whether certain statements will be self-incriminating, *Escobedo v. Illinois,* 378 U.S. 478, at pages 484-489, *Miranda v. Arizona,* 384 U.S. 436, at p. 466.

Miranda warnings are not a substitute for these substantive constitutional rights but are a prophylatic measure intended to protect individuals from governmental invasion of those rights under the Fifth Amendment due process clause. Due process is a flexible concept and "calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481.

The circumstances of the August 2, 1972, interview were such that the Government agents were required to give petitioner full *Miranda* warnings, since the investigative techniques employed directly affected the exercise of his substantive rights.

As noted, *supra,* at p. 25, criminal tax investigations like the one at issue differ significantly from ordinary criminal investigations primarily because the defendant himself supplies information, either by written or oral statement which must be characterized as self-incriminating because these statements are an essential element of the prosecution's net worth case. *Holland v. United States, supra.*

When technically skilled agents, hoping to derive incriminating statements in order to ease the obtaining of a conviction, approach a target taxpayer like petitioner, the confrontation achieves unfair proportions due to the mere complexity of the subject matter and civil obliga-

tions contained in the tax laws. At this point the need for the exercise of the right to silence is imperative and the assistance of counsel invaluable.[25]

The IRS recognizes the role counsel could play during these initial interviews and encourages agents to avoid dealing with "representatives" in favor of going directly to the taxpayer. IRS Training No. 3158-01 (5-73), §2.034 set forth in part, *supra* p. 26. These shortcuts are not constitutionally permissible despite the lawful governmental objective of capturing criminals for the "official's measure of his own need often does not square with the Bill of Rights." *Frank v. Maryland,* 359 U.S. 360, 382 (1958) (Douglas, J., dissenting).

The procedural safeguards of *Miranda* must attach at this point for the investigation is criminal in nature, thus higher standards of due process must be observed in light of the fundamental interests and rights of defendant involved. *Jenkins v. McKeithen,* 395 U.S. 411; *Donaldson v. United States,* 400 U.S. 517, 533.

Many recent cases have required the Government to give full *Miranda* warnings to grand jury witnesses where the Government had "one eye on the possible prosecution of defendants." *United States v. Mandujano,* 496 F.2d 1050 (5th Cir.); *United States v. Rangel,* 496 F.2d 1059 (5th Cir.); *United States v. Prior,* 381 F.Supp. 870 (H.D. Fla.); *United States v. Wong,* No. 74-1636 (Sept. 23, 1974, 9th Cir.) (petition for *certiorari* pending). In

---

[25]There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination. Escobedo v. Illinois, 378 U.S. 478, 488.

those cases, the courts suppressed statements made to the grand jury and later used in perjury prosecutions because the Government failure to meaningfully advise "virtual defendants of their right to remain silent and to have the assistance of counsel was unfair and had the incidental effect of encouraging perjured testimony before the grand jury.

> We cannot ignore the obvious fact that, while few witnesses placed in such a position might honestly wish to confess, in the great majority of cases asking incriminating questions of a putative defendant, were the witness fully informed of his rights, would be an idle task, as the witness would simply remain silent. The utility of the procedure to the Government and its inherent unfairness and danger lie in the wholly predictable fact that the witness will be ignorant or not understand the right to remain silent and be compelled by answering to subject himself to criminal liability. *The Government should not engage in such a practice.* (Emphasis added.) *United States v. Rose Wong, supra,* Slip op. 4.

The focus here, as in all exclusionary rule cases, is not upon defendant's conduct but rather upon the Government's behavior. It is irrelevant whether petitioner answered questions voluntarily if the procedure whereby he was induced to answer was one calculated or having the effect of depriving him of the ability to exercise his constitutionally protected rights. Under the circumstances of this case, just as in the grand jury cases, Government failure to observe *Miranda* requirements creates a situation where a target defendant is encouraged to forego exercise of his rights primarily out of ignorance, thus giving the prosecution an unfair advantage at the expense of fundamental rights.

The truth-seeking function of the criminal system is impaired by special agents' failure to comply with *Miranda* in this case, in the same way the prosecutor's conduct did in the grand jury cases, because the agents' activity has the incidental effect of encouraging target defendants to make false or unreliable responses during interrogation.

> As the Supreme Court said about the hazards to the innocent in a case based upon statements of this sort, "When a revenue agent confronts the taxpayer with an apparent deficiency, the latter may be more concerned with a quick settlement than an honest search for the truth. Moreover, the prosecution may pick and choose from the taxpayer's statement, relying the favorable portion and throwing aside that which does not bolster its position." The statements are also of doubtful reliability because the taxpayer often does not know the facts. Few people can remember what their net worth was five or ten years before, except in the crudest sense. Unreliability is compounded by the fact that the taxpayer is seldom more than vaguely aware of the utility of the statement to the prosecution and cannot know its precise purpose.
>
> Duke, supra, 76 *Yale L.J.* 1, 17.

This kind of investigative technique "smacks" of entrapment. *United States v. Mandujano,* 496 F.2d 1050, 1055 (5th Cir.) citing with approval District Court opinion, 365 F.Supp. 155, at 496 F.2d 1050, 1053, and must not be counternanced by the courts.

Surely the Governmental interest in apprehending and punishing criminals cannot justify the impairment of individual liberty or the manipulation of the criminal justice system to achieve that result.

> We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system. *Escobedo v. Illinois,* 378 U.S. 478, 490.

D. The Warnings Accorded Petitioner Were Insufficient Under Miranda.

In this case, warnings given by the special agent are set forth in the first page of the agent's Memorandum of Interview. (R. 7, p. 15.) (App. 65-66)[26] These warnings clearly fall far short of Constitutional requirements.[27]

1. Right to remain silent.

Miranda said that a warning as to the right to remain silent and that anything stated can be used against a defendant is "an *absolute prerequisite* to interrogation." *Miranda, supra,* 384 U.S. 436, 471. In this case,

---

[26]Also see (Pet. App. 46) for a contrast of the advice to petitioner and the warnings held to comply with *Miranda* by the District of Columbia Circuit.

[27]The IRS itself recognizes that the warnings given by a special agent during an interview do not comply with *Miranda.* Instructions issued to IRS special agents provide for full *Miranda* warnings only when the person is taken into custody or placed under arrest. See IRS Press Release issued October 3, 1967, CCH 67-2, Par. 9489 N.9. (R. 9, p. 19.) and News Release of Nov. 26, 1968 (App. 67-68).

the petitioner was told by the special agent: "Under the Fifth Amendment . . . I cannot compel you to answer any questions . . . if such answers or information might tend to incriminate you in any way." This simply is not the law, and is certainly an inadequate warning of the petitioner's right to total silence. We submit this inadequacy is further multiplied in tax cases. As noted *supra*, p. 24, because of the complexity of the tax law, what seemed to petitioner the most innocuous of remarks earned him five (5) years in the penitentiary and a $10,000.00 fine.

The Courts, following *Miranda*, have guarded closely this portion of the *Miranda* warnings. In *United States v. Mullings*, 364 F.2d 173 (2d Cir.), the Court found inadequate the warning "that he had a Constitutional right not to answer . . . any questions if he felt that the answers to those questions would in any way incriminate him,"[28] recognizing the misleading nature of this advice. In *United States v. Fox*, 403 F.2d 97 (2d Cir.) the defendant was told that he did not have to make a statement, which the Court found to have been an inadequate warning of his right to remain silent. We submit the same ruling should be made in this case.

2. Right to Have an attorney present during interrogation.

Similarly, with respect to the right to remain silent, this Court held that as an "absolute prerequisite to interrogation" the person must be told of the "right to consult with a lawyer and to have the lawyer with him during interrogation." *Miranda, supra*, 384 U.S. at 471. In this case the petitioner was told by the special agent,

[28] *Mullings, supra*, 364 F.2d at 175.

"I advise you further that you may, if you wish, seek assistance of an attorney before responding." Clearly this warning does not inform the petitioner of his right to the presence of an attorney during interrogation. (App. 66)

In *Windsor v. United States*, 389 F.2d 530 (5th Cir.), the Court held that merely telling a defendant that he could speak with an attorney or anyone else before he said anything was insufficient to meet *Miranda's* requirements. See also, *Montoya v. United States*, 392 F.2d 731 (5th Cir.); *United States v. Fox, supra.*

3. Right to an appointed attorney.

Miranda, holds that the person must be advised that "if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda, supra*, 384 U.S. at 479. The advice which the defendant received, as stated in paragraph 2 above, did not inform him of his right to court-appointed counsel.

In *Green v. United States*, 411 F.2d 588 (10th Cir.), the defendant was questioned but was not advised that if he could not afford an attorney, one would be appointed. The Court said, "Such a warning now appears to be a necessary inclusion." *Green, supra*, 411 F.2d at 589. See also, *United States v. Miller*, 261 F.Supp. 442 (D. Del.) where the defendant's statements were suppressed where he had been questioned by FBI agents who had warned him of all his rights except for his right to court-appointed counsel. As noted heretofore, p. 11, *Michigan v. Tucker, supra*, is not to the contrary. In fact, that case was considered on the assumption that full *Miranda* warnings had not been given due to failure to include the right to a court-appointed attorney. Thus, the case serves to emphasize the inadequacy of the warnings given here.

4. Right not to produce documents.

As stated in paragraph D1 above, the defendant was told "I cannot compel you to . . . submit any information if such . . . information might tend to incriminate you in any way." The defendant was not told that he could refuse to produce any books and records.

Most taxpayers, unfamiliar with tax laws, assume that they can be compelled to submit to IRS agents their books and records. Indeed, lawyers and some judges also share the popular misconception that tax records must be produced. Compare *Stern v. Robinson,* 262 F.Supp. 13 (W.D. Tenn.), *appeal dismissed,* 391 F.2d 601 (6th Cir.) with *Schmedber v. California,* 384 U.S. 757, 763-764.

E. There Exists a Minimal Burden of Corrective Action.

Since some attempt was made to provide petitioner with warnings, this Court might wish to weigh what burden would be placed upon the Government in the event petitioner's arguments here are to be accepted.

Petitioner requests only that full *Miranda* warnings be given when the "second stage" of a tax investigation is reached, i.e., when "special agents" of the "intelligence division" who are exclusively concerned with criminal activity interview a taxpayer.

This might entail the reprinting of warning cards for the special agents. The IRS warnings appear to be revised from time to time already[29] and the minuscule cost of printing such warnings is one that appears to have been

---

[29]Apparently, the IRS has the full *Miranda* warnings which are to be given when the taxpayer is physically taken into custody (App. 67-68).

successfully borne by every other law enforcement agency, state and federal, no matter how small or how remote.

The only other possible burdens accruing to the Government from full warnings would be slowed or stinted criminal prosecutions stemming from the fact that taxpayers sought to exercise their rights. This Court and the Circuit Court below long ago made the decision that such burdens did not outweigh the fostering of the exercise of constitutional rights even where the continued freedom of murderers (*Killough v. United States,* 114 U.S.App. D.C. 305, 315 F.2d 241, *Escobedo v. Illinois, supra*) and of rapists (*Mallory v. United States,* 354 U.S. 449, *Miranda v. Arizona, supra*) was at stake. No logical reason appears why our Government cannot afford this burden in a case when it is allegedly owed $8,348.51 by an accused.

Only one explanation exists for the continued existence of the present watered-down warnings now given. The Internal Revenue Service fears that taxpayers will exercise their constitutinally guaranteed rights to counsel and to be free from self-incrimination.

CONCLUSION

WHEREFORE, it is submitted that the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

JOHN G. GILL, JR.
17 West Jefferson Street
Rockville, Maryland 20850
Attorney for Petitioner.